FRASER & NEAVE LTD.

v.

YEO HIAP SENG LTD.

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
LP THEAN J
FA CHUA J
[CIVIL APPEAL NO. 4 OF 1987]
16 NOVEMBER 1988

CIVIL PROCEDURE: *Interlocutory injunction - Undertaking as to damages - Assessment of damages - Whether damages claimable as a right - Requirement to establish existence and extent of loss - Onus of proof in inquiry - Right to nominal damages - Costs.*

The plaintiff (F & N) sued the defendant (YHS) claiming an injunction and damages for infringement of their registered trademark and passing off "SARSI" a Sarsaparilla drink bottled by F & N and marketed as "SARSI" when YHS introduced a new carbonated drink known as "Mirinda Sarsi".

On 13 April 1978 F & N was granted an interlocutory injunction which order contained the usual undertaking by the plaintiff to abide by any order of the Court as to damages.

On 29 August 1980 the plaintiff's action was dismissed in the High Court and the injunction discharged. The Judge ordered that damages pursuant to the undertaking be assessed by the Registrar. Pending F & N's appeal to the Court of Appeal, a stay of assessment was granted.

F & N did not pursue with the appeal which was deemed withdrawn on 22 January 1982.

The Senior Assistant Registrar found that no damages were payable by F & N to YHS and on appeal to the Judge, the Judge allowed YHS's appeal and awarded a sum of $674,000 with interest at 6% per annum from 13 April 1978 (the date of the injunction) to the date of judgment.

F & N now appeals to the Court of Appeal. Three (3) issues were raised, namely:

(i) the basis of claim;

(ii) the computation of claim; and

(iii) the period of claim.

Various points of the basis of computation of the claim alleged by YHS are stated in full in the Judge's speech.

Held:

[1] The fact that an inquiry and an assessment of damages has been directed pursuant to an undertaking in an injunction does not raise a presumption that damage has in fact been suffered.

The purpose of any such inquiry is to establish : (i) the existence and (ii) the extent of any damage.

[2] If the party concerned has an arguable case for claiming damages, the Court would, as a matter of justice, make an order for an inquiry to enable that party to pursue it. The inquiry would of course be at that party's risk as to costs.

[3] The onus of proof lies on the party who asserts that it has sustained damage, and it must be proved that the damage was caused by the injunction.

[4] The respondent has failed to prove that they had suffered damages and the basis of their claim is illogical.

[5] The respondent shall pay the costs of the assessment of damages before the Registrar the High Court and the Court of Appeal.

[Appeal allowed. The respondent to pay the costs of the assessment of damages before the Registrar of the High Court and the Court of Appeal.]

Cases referred to:
Mcdonalds's Hamburgers Ltd. v. Burgerking (UK) Ltd. [1987] FSR 112
Air Express Ltd. v. Ansett Transport Industries (Operations) Pty Ltd. [1981] 146 CLR 249

Legislation referred to:
Rules of the Supreme Court [Sing], O. 57

Other source referred to:
McGregor on Damages, 14th Edn., at Chapter 10

JUDGMENT

Wee Chong Jin CJ, LP Thean J, FA Chua J:

This is an appeal by Fraser & Neave Ltd. against the decision of P. Coomaraswamy J, who allowed the appeal of Yeop Hiap Seng Ltd. against the decision of the Assistant Registrar. The parties will hereinafter be referred to as "F & N" and "YHS" respectively.

The Facts

F & N and YHS are manufacturers of soft drinks. F & N is particularly strong in carbonated drinks while YHS's strength lies in still soft drinks. F & N have been bottling the drink Sarsaparilla and marketing it as "Sarsi" in Singapore from about 1929. In December 1977, YHS introduced a new carbonated drink known as "Mirinda Sarsi".

F & N thereupon commenced a suit against YHS, claiming an injunction and damages for infringement of their registered trademark and for passing off "Sarsi". On 13 April 1978, F & N obtained an interlocutory injunction in the following terms:

(1) The defendant Yeo Hiap Seng Ltd. be restrained from infringing the plaintiffs' registered Trade Mark No. 4551 (whether acting by their servants or agents or any of them or otherwise howsoever) from using the Chinese characters as descriptive of or in connection with any aerated waters manufactured by them in all advertisements or posters appearing in the locally distributed newspapers and in the radio and television media in Singapore until after the trial of this action or until further order.

(2) The defendants remove and pull down all posters containing the said Chinese characters and exhibits in all or any parts of Singapore wherever they appear in any premises in the Republic of Singapore.

The order for injunction contained the usual undertaking by the plaintiffs to abide by any order the Court may take as to damages.

On 29 August 1980, at the end of a lengthy trial, Sinnathuray J dismissed F & N's action and discharged the injunction. He also directed the Registrar to assess damages pursuant to the undertaking given in the injunction. The judgment is reported in [1982] 1 MLJ 122. A stay of the assessment pending F & N's appeal to the Court of Appeal was granted.

However, F & N did not pursue the appeal which was deemed withdrawn on 22 January 1982 pursuant to Rules of Supreme Court, O. 57 assessment of damages as ordered by Sinnathuray J.

The assessment before the Assistant Registrar took almost 7 days. In a reasoned judgment, the Assistant Registrar rejected the basis of YHS's claim. He also found that a proper computation of YHS's costs would have resulted in a negative figure (i.e. a loss) in any event and that no damages were therefore payable. We shall come to his findings shortly and will deal at some length with them, as many of the points canvassed before him were repeated before us.

From that decision, YHS appealed to a Judge in chambers. P. Coomaraswamy J allowed the appeal with costs and ordered F & N to pay YHS the sum of $674,000 by way of damages. He awarded interest at 6% per annum from 13 April 1978 (the date of the injunction) to the date of his judgment.

Against that decision, F & N have now appealed to us.

The Assistant Registrar's Decision

In the proceedings before the Assistant Registrar, YHS put forward the following basis for computing the sales that they claimed to have lost. They asserted that, but for the injunction, the ratio of sales of their Mirinda Sarsi to Mirinda Orange would have been the same as the ratio of sales of F & N Sarsi to F & N Orange. This, YHS said, would be a comparison on a like-for-like basis.

Accordingly, YHS contended that the damages that flowed from the injunction would be the difference between their Mirinda Orange sales and their Mirinda Sarsaparilla/Sarsi sales. Further, the period over which the loss of sales should be accounted for should be from 13 April 1978 (the date of the injunction) to 30 September 1984 (the end of the YHS's financial year for 1984, a period of almost 6½ years). This was because, YHS submitted, a new flavoured drink would find its level of sales within one year of its introduction. In the case of a relaunch, a longer period must of necessity lapse before the re-introduced soft drink could find its level of sales. YHS maintained that they could not use "Sarsi" from 13 April 1978 to 22 January 1982 (the date F & N's appeal against Sinnathuray J's decision was deemed withdrawn).

The Assistant Registrar found that the restriction contained in the injunction lasted from 13 April 1978 to 29 August 1980 only (the date F & N's action was dismissed and the injunction discharged). He would have confined any award of damages to the period 13 April 1978 to 29 August 1982 (two years after the discharge of the injunction).

However, the Assistant Registrar rejected the basis put forward by YHS for the computation of damages for the following reasons:

(1) All 4 products were distinctly different in formulation and taste.

(2) Mirinda Sarsi was introduced only in late 1977 whereas F & N Sarsi was introduced around 1929. F & N Sarsi was also a clear market leader in Singapore. The Assistant Registrar doubted that what F & N had achieved in 50 years of marketing their Sarsi, YHS could achieve in 5 months.

(3) The sales trends between F & N Orange and F & N Sarsi were different, and were further different from those between Mirinda Orange and Mirinda Sarsi.

(4) There was no functional relationship between Mirinda Orange advertisement and its sales, and by that same token, Mirinda Sarsi advertisement would not have a functional relationship with its sales volume.

The Assistant Registrar then went on, nevertheless, to deal with the evidence and the arguments on the detailed computation of YHS's claim. His main findings were:

(1) Although there had been a cost increase of production items amounting to $1.205 per case during the period of the claim, YHS had accounted for only 18 cents, resulting in an omission of $1.02 cents per case. This would have meant lower production costs, and thus greater profitability.

(2) Certain production items like bottles and crates, that ought to have been taken into account in the computation of production costs, had been omitted. The so-called "base costs" omitted amounted to 71.66 cents per case.

(3) Advertisement costs for Mirinda Sarsi, if its sales volume was to be as large as Mirinda Orange's should logically be as large as those for Mirinda Orange for each year, and should not be based on the lowest differential of 26% of 1984. This figure of 26% was the difference in sales volume between Mirinda Orange and Mirinda Sarsi in 1984. According to YHS, to get Mirinda Sarsi sales up to the level of Mirinda Orange's, all that was needed was 26% of the advertisement costs spent on Mirinda Orange. That figure applied throughout all the years although the difference in sales volume in all the other years was considerably higher than 26%. The Assistant Registrar dismissed this argument as incorrect as it defied logic.

(4) Price discounting and funds for sales promotion had not been properly accounted for in YHS's computation. They had been understand.

In the result, what was arrived at was a composite negative figure for the period of YHS's claim. The Assistant Registrar found that such a conclusion, though seemingly absurd, was in fact not so. Volume was a critical factor in the soft drinks industry, and F & N Sarsi, with a sales volume ten times larger than Mirinda Sarsi, made an aggregate loss of $572,700 for the period 1 April 1977 to 31 March 1982.

Accordingly, the Assistant Registrar certified that no damages were due to YHS and ordered that YHS pay F & N the costs of the assessment.

The Appellate Judge's Decision

On the first issue of whether YHS's basis of claim was an acceptable one, P. Coomaraswamy J had this to say:

> The plaintiffs' criticism of this method which the Assistant Registrar accepted was that it was not logical for the defendants to use the plaintiffs' (F & N) products as a basis for comparison, for which he gave a number of reasons, as it was "not on a like-for-like basis".

I fail to understand this argument. Both the plaintiffs and the Assistant Registrar proceeded on a direct comparison basis and failed to understand that the comparison between the F & N Orange and Sarsi on the one hand and the Mirinda Sarsi on the other was simply to work out the sale trend (which could be up or down) and to get the differential between the defendants' Mirinda Orange and Mirinda Sarsi. Once this was done the profit element was worked out by relation to the defendants' own production cost and sales figures, actual or projected.

I am view that the Assistant Registrar was wrong to have rejected the defendants' method of computing the damages due to them as a consequence of the undertaking given by the plaintiffs when the interim injunction order was made. I find the method employed by the defendants the only method open to them in the circumstances and can find no valid criticism of it.

Insofar as the computation was concerned, the Judge said:

The real dispute in this case is whether such items as electricity, boiler fuel and water should be classified under manufacturing overheads, i.e., direct variable costs as the defendants contend or should they be omitted from direct variable costs as the plaintiffs contend. Also, whether certain other items such as bottles, plastic shells, capital financing, machinery repairs and maintenance, bottle adjustments and depreciation of fixed assets should be classified as indirect fixed costs as contended by the defendants and not as direct variable costs as the plaintiffs contend. In such case the defendants, as alleged by the plaintiffs, have omitted a base cost of 71.66 cents per case.

I have studied the evidence and the written submissions of the both sides and I am satisfied that the defendants' contentions are correct. It could not be otherwise as it is evident that the method of costing employed by the defendants is the marginal costing method.

Following from this, I have to consider whether the defendants have omitted to take into account $1.02 per case from the cost increase of production items of $1.205 per case during the period of the defendants' claim, and whether the plaintiffs' contention of the omission of 71.66 cents per case from the base costs is correct.

I do not propose in this judgment to deal at length with these issues. It is clear to me that the plaintiffs are playing with figures. By moving the production items from direct variable costs to indirect fixed costs and vice versa one can get whatever result one desires. This is how the plaintiffs have chosen to deal with the defendants' claim. This is clearly demonstrated by the fact that at the hearing before the Assistant Registrar, the plaintiffs contended that the defendants would have made a loss of $392,000 but during the hearing and by moving the production cost items from one side to the other, they ended up by showing that the defendants in fact would have made a loss of $1,375,000. Suffice it to say that I accept the defendants' written submissions on these points as well as on the question of advertising expenses, price discounts and trade promotion which I find most persuasive and compelling.

The Judge then considered the period of accountability put forward by YHS. He decided that it should not extend beyond 30 September 1981, as that would have given YHS sufficient time to recover from the effects of the injunction. The period allowed by him was therefore from the date of the injunction to approximately 1 year and 1 month after the discharge of the injunction.

Using YHS's Exhibits D1 and D2, he assessed damages at $674,000. It was not immediately obvious from the judgment how that figure was arrived at, but Mr. Jacob has since enlightened us on this.

Exhibit D1 was a two-page computation by YHS showing the amounts of alleged loss of profits over the period of their claim. Exhibit D2 was YHS's computation of the advertisement costs that they would have had to incur to bring Mirinda Sarsi sales to the level of Mirinda Orange sales over the same period. This, as stated earlier, was based on the lowest differential of 26% for 1984. By totalling up the alleged loss of profits from 13 April 1978 to 30 September 1981 (in D1), one would get $801,000. By adding up the advertisement costs for the same period (in D2) as computed by YHS, one would get $127,000. Since YHS accepted that they had to deduct advertisement costs from their claim, one would get $674,000 (i.e. $801,000 minus $127,000).

However, Counsel for F & N has brought to our attention that the Judge had in fact given YHS more damages than they asked for. This was because YHS had revised their claim to lower amounts for each of the years in question. The revised claim is in Exhibits D5. As for the evidence pertaining to this exhibit, see Record of Appeal, Vol. 2A at p. 119. Therefore even if the Judge was right in assessing damages in the above manner, he should have awarded only $594,000 (as revised by YHS) and not $674,00.

Having explained this mystery, we now turn to the appeal before us.

Our Decision

We should first set out some legal principles applicable to a case such as this. The fact that an inquiry/assessment of damages has been directed pursuant to an undertaking in an injunction does not raise a presumption that damage has in fact been suffered. The purpose of any such inquiry is to establish: (1) the existence; and (2) the extent of any damage. If the party concerned has an arguable case for claiming damages, the Court would, as a matter of justice, make an order for an inquiry to enable that party to pursue it. The inquiry would of course be at that party's risk as to costs (see *Mcdonald's Hamburgers Ltd. v. Burgerking (UK) Ltd*. [1987] FSR 112, a decision of the England Court of Appeal).

The onus of proof lies on the party who asserts that it has sustained damage, and it must be proved that the damage was caused by the injunction (see *Air Express Ltd. v. Ansett Transport Industries (Operations) Pty Ltd.* [1981] 146 CLR 249, a decision of the High Court of Australia).

(1) *The Basis of Claim*

F & N took exception to the basis of computation which they termed the "Orange Comparison". They maintained that YHS's assertion, that the ratio of sales of Mirinda Sarsi to Mirinda Orange would have been the same as that of F & N Sarsi to F & N Orange, required proof and there was no or no adequate proofs. The same reasons submitted to and accepted by the Assistant Registrar, showing the illogicality of the basis, were canvassed before us again to persuade us to reject the basis.

During the course of the assessment, the Assistant Registrar sought further information from Mr. Edward Lim, the general manager of F & N (PW3), on the sales trends of F & N Orange and Sarsi for the previous 10 years. As a result, Exhibit P34 was produced. That document showed the proportion of actual sales of F & N Orange and Sarsi from 1974 to 1983. The result, it was argued, showed no relationship between the two drinks. In other words, you could not predict one from the other. It was also said that F & N Orange sales did not include F & N's Fanta Orange.

For the above reasons, F & N submitted that the Judge had failed to understand the flaw in YHS's argument when he said in his judgment that the comparison was simply to work out the sales trend, which could be up or down, and to get the differential between YHS's Mirinda Orange and Mirinda Sarsi.

We are of the opinion that the contentions put forth by F & N are well-founded. F & N and YHS are two different manufacturers, producing and selling their respective orange and sarsi drinks in different quantities, assuming that their orange and sarsi drinks are respectively the same products. Their sales must inescapably depend on multiple factors, some of which, at least, are not common to both. Plainly, in the absence of any credible evidence, it cannot be said that they would be selling their orange and sarsi drinks in the same ratio. Like the Assistant Registrar, we would also reject the basis of YHS's claim.

(2) *The Computation*

It should be emphasized at the outset that the period 1979 to 1983 was a difficult time for the soft drink market. It was a time of low growth and declining profitability in a highly competitive market. The annual reports of YHS from 1979 to 1983 generally bemoaned the higher costs in materials, intense competition from local and overseas manufacturers, lower profit margins and tough trading conditions. It is in such a context that we must now examine YHS's claim that Mirinda Sarsi, but for the injunction, would have made more than one million dollars during the period of YHS's claim.

The first bone of contention was whether YHS had omitted major items of production costs in their computation. YHS insisted that they had surplus bottles and crates, and therefore did not need to purchase such items to produce the volume that they said they had lost in sales. They buttressed their argument on the fact that their Mirinda brand as a whole (i.e. all Mirinda flavours) waned considerably during the period in question (from 2.1 million crates to 840,000), thereby releasing a whole lot of surplus bottles which they could have used for the production of Mirinda Sarsi. We interject here to say that this acknowledged fact would seem to militate against YHS's claim.

It is plain that such argument cannot hold water. We would have dismissed it summarily if not the fact that the argument was pursued with such urgency before the Assistant Registrar, the Judge and before us here. Even if there were surpluses, increased production means increased wear and tear, and breakages. Whether the bottles were bought earlier or during the course of production, it remains that the cost incurred must be attributed to the product (in this case, Mirinda Sarsi) anyway. The argument is also inconsistent with YHS's submissions to the Ministry of Trade and Industry (Exhibit P5) where bottles and crates were mentioned as necessary production items (We will have occasion shortly to elaborate on Exhibit P5).

Counsel for YHS has in the end conceded before us that bottles and creates should have been taken into account in computing YHS's production costs and that adjustments in the figures should be made accordingly.

We should add that, in any event, the evidence adduced did not support YHS's assertion that they had surplus bottles and crates. That was the finding made by the Assistant Registrar and we see no reason at all to disagree with him on this point.

Insofar as the omission of pallets and financing costs was concerned, the same line of argument, in respect of bottles and crates was adopted by YHS. We need only say that the argument must fail for the same reasons.

The next major issue was whether YHS had failed to take into account cost increases in production items.

F & N maintained that, from 1978 to 1980, there had been an increase in YHS's production costs amounting to $1.205 per crate. For this, they relied on Exhibit P5, which was YHS's own document submitted to the Ministry of Trade and Industry to appeal for an increase in the sale price of soft drinks, which was fixed. F & N had made a similar appeal. Both parties were aware of each other's submissions to the Ministry. F & N said, looking at YHS's Exhibit D1, the "total variable cost" for 1978 was $2.77 per crate, and that for 1980 was $2.95 per crate, reflecting an increase in cost of only 18 cents. It was thus apparent that YHS had omitted $1.025 per crate in their production cost.

Looking at the documents and the evidence adduced, it is plain that F & N's contentions are correct. Exhibit D1, put forward by YHS for the purpose of the assessment, clearly contradicted Exhibit P5, YHS's own document to the Ministry to justify a price increase in soft drinks. It was also inconsistent with what F & N had submitted to the Ministry in this respect. Further, if the increase in production cost were not so drastic, it is reasonable to assume that the Ministry would not have approved a price increase of $1.40 per crate in 1981, and it is not disputed that such an increase did take place.

The huge increase in cost would also be consistent with YHS's statements in their annual reports. Furthermore, it would be consistent with F & N's statement of profitability of Sarsi for 1 April 1977 to 31 March 1982 (Exhibit P4) which shows negative contributions between 1979 to 1982 (i.e. losses were incurred). If F & N made a loss of their very well-established Sarsi, it is difficult, on the evidence, to accept that YHS, a newcomer in this product, could have made the profits claimed by them.

In the light of the above, and the totally unsatisfactory explanations given by YHS's witness who attempted to show that all cost increases had been accounted for, we conclude that YHS, while taking into account the *price* increase for soft drinks, had omitted a cost increase of $1.025 per crate.

The next point concerns the advertising costs for Mirinda Sarsi. We have already set out the arguments on this issue when we referred to the decision of the Assistant Registrar earlier on in this judgment. The arguments before us were no different. The Judge accepted that the differential of 26% should apply throughout the period in question. With respect, we disagree with him. If we are to proceed on the so-called "like for like" basis put forward by YHS, then surely the approach of F & N must, in logic, be preferred. We are of the view that Mirinda Sarsi's advertising costs must match those for Mirinda Orange for each of the year.

The other matters alleged to have been left out in YHS's computation relate to price discounting and funds for sales promotion. Not much argument was advanced by either party before us. For the sake of completeness, however, we find no reason to disagree with the findings of the Assistant Registrar in respect of these items.

(3) *The Period of Claim*

It is unnecessary to decide this point. Having come to the above conclusions insofar as computation is concerned, whether we decide that the period of accountability should end at 29 August 1980 (the date the injunction was discharged), or at 30 September 1981 (as was decided by the Judge), or until 30 September 1984 (as contended by YHS), end result would

still be a negative figure. YHS would have made losses on Mirinda Sarsi. No damages are therefore payable.

There is one minor issue that we should perhaps touch on briefly. This concerns the boycott.

In March 1978 (i.e. shortly before the injunction was granted), YHS increased the deposit for their crates. They had switched from using wooden to plastic crates. As a result, the Singapore Provision Shop Friendly Association organized a boycott of YHS's drinks. Although not all retail outlets were involved, more than 1000 shops did take part in the boycott which lasted about a year. F & N submitted that the boycott would be damaging and it could be inferred that the effect was significant and would have reduced sales of Mirinda Sarsi significantly, even if it had been marketed under that name. The Assistant Registrar thought it was too speculative in the absence of more evidence and disregarded it. The Judge agreed with him.

The boycott of all YHS's drinks would have affected both Mirinda Orange and Mirinda Sarsi. Since YHS was proceeding on a comparison basis, this boycott, in our opinion, did not matter anyway.

It remains for us to consider whether we should certify that no damages are payable to YHS, or make an award of nominal damages to them. *McGregor on Damages* (14th Edn.) at Chapter 10 sets out the circumstances giving rise to an award of nominal damages. They are:

(1) Where there is *injuria sine damno*. An *injuria* or wrong entitles the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only. However this statement is made in the context of breach of contract and of tortious invasions of legal rights. The grant of an injunction which is subsequently discharged does not *per se* give a right to damages. As Stephen J said in the *Air Express Ltd*. case (*supra*) at p. 319:

> But a plaintiff who sues for an injunction and obtains interlocutory relief, giving an undertaking to the Court as the price of that relief, commits no wrongful act, no breach of contract or of duty when, at the trial, he fails to obtain any perpetual injunction.

(2) Where damage is shown but its amount is not sufficiently proved. The problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss. Our present case is clearly one of absence of loss.

In the case before us, the plaintiffs (F & N) failed in their action against the defendants (YHS). In such an inquiry pursuant to an undertaking, the purpose, as we have said earlier, it to determine the existence and the extent of damages if any. Having rejected YHS's basis of claim and found that they would in fact have made no loss, we must, for the purpose of this inquiry, treat YHS as unsuccessful plaintiffs. It would therefore not be correct to award nominal damages.

It has been emphasized that the ordering of such an inquiry would be at YHS's risks as to costs. In the light of our findings, the only appropriate order to make is that YHS bear the costs of the assessment before the Assistant Registrar and of the appeals therefrom.

Our Orders

(1) The appeal by F & N is allowed in that no damages are due and payable by F & N to YHS.

(2) The respondents, YHS, are to pay the taxed costs of the appellants, F & N, in respect of;

(a) the assessment before the Assistant Registrar;

(b) the appeal before P. Coomaraswamy J; and

(c) the appeal before us.

(3) The deposit of $2,500 paid in as security for costs by the appellants is to be paid out to them.

Order accordingly.

Also found at [1989] 1 CLJ 275